Supreme Court, U.S.
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No. 96-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, in propria persona
Petitioner,
vs.
COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment to the Constitution confers upon individual citizens standing to enforce a personal right to keep and bear arms.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Douglas Ray Hickman and the following: the County of Los Angeles, Sherman Block, Patrick G. Leonard, Claude Farris, Ed Barston, the City of Los Angeles, Robert M. Talcott, Herbert F. Boekmann, Rev. A. B. Tooley, Samuel L. Williams, Stephen D. Yslas, Frank E. Peirsol, the City of San Fernando, and Dominick J. Rivetti.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Hickman v. Block, et al.*, 81 F.3d 98 (9th Cir. 1996) and is reproduced in the Appendix ("App.") at "2a". The opinion of the United States District Court was not reported.

JURISDICTION

On April 5, 1996, the Court of Appeals affirmed the judgment of the District Court, ruling that petitioner Hickman had no standing to sue as an individual under the Second Amendment. Having not sued to defend the "state's right to keep an armed militia," he had failed to show "injury" as required by the constitutional doctrine of standing. Therefore, the Court of Appeals reasoned, because the Second Amendment is a right held only by the states, and not by individual citizens, an individual citizen like Hickman could show no legal injury. On May 6, 1996, the Court of Appeals denied Hickman's right to file a petition for rehearing, and his suggestion for rehearing en banc, on the grounds that the requisite papers were filed one day late. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not infringed. U.S. Const., Amend. II.

42 U.S.C. Section 1983 (Reproduced in the Appendix.)

Cal. Penal Code Section 12050(a)(1) (Reproduced in the Appendix.)

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Douglas Ray Hickman is a citizen of the United States who sought from the respondents, on various occasions, a permit to carry a concealed firearm pursuant to California Penal Code Section 12050(a)(1). Each request for a permit was rejected. Hickman then filed suit for damages and injunctive relief. His claim for relief under 42

U.S.C. Section 1983, based on a violation of the Second Amendment, was dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). Eventually the remaining claims were rejected by the District Court. After summary judgment was granted for the remaining parties, County of Los Angeles, City of San Fernando, and their respective named officials, Hickman appealed the granting of summary judgment to the Court of Appeals. Federal jurisdiction in the Court of Appeals was based on 28 U.S.C. Section 1291.

On appeal, the Ninth Circuit panel isolated Petitioner's Second Amendment claim and issued a published opinion on that claim alone; all other claims were denied in an unpublished memorandum opinion. Specifically, the Court of Appeals affirmed the judgment of the District Court on the basis that it had no jurisdiction to hear the appeal.

The Court of Appeals based its finding that Hickman had no standing on the belief that "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." *Hickman*, 81 F.3d at 101. The Court of Appeal thereafter denied Hickman's petition for rehearing and suggestion for rehearing en banc on the grounds the attempted filing of the petition was one day late.

(ii) Facts

Hickman applied to the respondents for a concealed firearms permit under the authority of a California statute which provides, in relevant part:

> The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver or other firearm capable of being concealed upon the person . . . .

Cal. Penal Code Section 12050(a)(1).

None of Hickman's various permit applications was approved by the respondents. Hickman then filed suit against the respondents, alleging, *inter alia*, a violation of a right guaranteed by the Second Amendment.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO CORRECT THE ERRONEOUS FINDING OF THE COURT OF APPEALS THAT THE SECOND AMENDMENT DOES NOT GUARANTEE THE INDIVIDUAL CITIZEN'S RIGHT TO KEEP AND BEAR ARMS SUCH THAT THE SECOND AMENDMENT DOES NOT CONFER UPON INDIVIDUAL CITIZENS STANDING TO ENFORCE THE RIGHT TO KEEP AND BEAR ARMS.

I.

INTRODUCTION

The Ninth Circuit expressly stated, "the Second Amendment is a right[1] held by the states, and does not protect the possession of a weapon by a private citizen."[2] This bald pronouncement is in direct conflict with the words of the Second Amendment, and it ignores this Court's interpretations of the scope and meaning of the Second Amendment. It is also completely at odds with the fundamental concepts of jurisprudence that the Constitution and Bill of Rights declare, protect and guarantee the "rights" of individuals while granting and defining limited "powers" to the national government and declaring those "powers" retained by the states and the people.

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[1] Of course, the Second Amendment itself is not a "right." Rather, it guarantees a right.

[2] See discussion in text, *infra*.

Equally disturbing, the Ninth Circuit's brief summary of this Court's decision in *U.S. v. Miller*, 307 U.S. 174 (1939), set forth in its opinion, was glaringly wrong, leading one to wonder whether the Court had actually engaged in any meaningful analysis of the case it relied upon as the "seminal authority in this area." *Hickman*, 81 F.3d at 101. Curiously, while the Ninth Circuit stated on April 5, 1996 in its *Hickman* opinion that "[w]e . . . hold[ ] that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen . . .", *id.*, six days later, in *U.S. v. Gomez*, 81 F.3d 846 (9th Cir. 1996), it stated, "The Second Amendment embodies the right to defend *oneself* and *one's* home against physical attack." *Gomez* 81 F.3d at 850, n.7. [emphasis added by Petitioner]. Unless the Court in *Gomez* meant states live in homes, one must assume that by "oneself" and "one's," it was referring to individuals.

Petitioner does not ask this Court to make any determination with respect to a right of individuals to carry concealed firearms, nor to decide whether the Second Amendment protections apply to the states through the Doctrine of Selective Incorporation.

II

THE NINTH CIRCUIT'S RULING CONFLICTS WITH THE PLAIN TEXT OF THE SECOND AMENDMENT, WHICH CLEARLY GUARANTEES AN INDIVIDUAL RIGHT

The panel's opinion cannot be squared with the text of the Second Amendment. The Amendment does not read: "right of the states." Rather, it reads: "right of the *people* to keep and bear arms. . . ."

The Constitution confers "powers" upon states, not "rights." [3] It therefore follows that the Ninth and Tenth Amendments (which were enacted as one document with the Second), differentiate "rights" of the people, from "powers" of the states.

It is equally difficult to square the panel's opinion with this Court's recent decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Referring expressly to the Second Amendment, this Court noted that wherever the term "the people" is used throughout the Bill of Rights, that term denoted "persons," " 'people to whom [rights] are secured by our Constitution' " — and when "right of the people" is used, it denominates the rights of those persons against government.[4]

In addition, this Court's decision in *Verdugo-Urquidez* suggests the phrase "right of the people" must be construed in *pari materia* in the First, Second and Fourth Amendments.[5] Yet if that suggestion is combined with the Ninth Circuit panel's conclusion that the Second Amendment creates only a states' right, it necessarily follows that the

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[3] *See, e.g.*, U.S. CONST. art. I, § 1 ("legislative powers"); U.S. CONST. art. II, § 1 ("executive power"); U.S. CONST. art. III, § 1 ("judicial power"); Tenth Amendment ("powers not delegated to the United States").

[4] See discussion at 265-66 and quotation of a First Amendment case; and at 266 describing the purpose of the Fourth Amendment, which also employs the right of the people phraseology, as being "to protect the people of the United States against arbitrary action by their own Government . . ."

[5] 494 U.S. at 265. *Compare Freytag v. Commissioner*, 501 U.S. 868, 889, 115 L. Ed.2d 764, 786 (1991) (". . .the Constitution's terms are illuminated by their cognate provisions.") and *Patton v. U.S.*, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in *pari materia*.").

First Amendment "right of the people" to assemble applies only to assemblies of state officials. Likewise, the Fourth Amendment "right of the people" to be secure against unreasonable searches and seizures would apply only against federal searches of state-owned buildings.

Not to construe the phrase "right of the people" as used in the Second Amendment in *pari materia* would imply the following absurd conclusion: when Congress drafted the Bill of Rights, it used "right of the people" in the First Amendment to mean an individual right; but 16 words later, it used the same phrase in the Second Amendment to mean a right of the states; but, 46 words later, in the Fourth Amendment, it used that phrase to mean an individual right, as it did in the Ninth Amendment; and then, in the Tenth Amendment, it specifically distinguished "the states" from "the people."

In short, the Ninth Circuit panel's decision necessarily leads to the absurd conclusion that every time the phrase "right of the people" was used in the Constitution, it referred to the rights of individual citizens as against the government, except when that phrase was used in the Second Amendment.

Moreover the Ninth Circuit panel's rejection of the individual right concept is diametrically opposed to the vast majority of the scholarly research, including 40 or more post-1980 law review articles, 15 in major reviews.[6] In

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[6]David B. Kopel, "It Isn't About Duck Hunting: The British Origins of the Right to Arms", 93 MICH. L. REV. 1333 (1995); Glenn H. Reynolds & Don B. Kates, "The Second Amendment and States' Rights: A Thought Experiment", 36 WM. & M. L. R. 1737 (1995); Robert J. Cottrol and Raymond T. Diamond, " 'The Fifth Auxiliary Right' ", 104 YALE L. J. 995 (1994); William Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994); Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9

contrast, endorsement of the states' right view is limited to a handful of articles by fervidly anti-gun authors, most being officers or paid employees of anti-gun groups, in mostly minor reviews.[7]

A further problem is that the "states' right" view contradicts the truism that the Bill of Rights does not create rights, but only guarantees pre-existing rights. From its "states' right" perspective, the panel understandably claims: "The Second Amendment creates a right. . . ." (emphasis added). However, that does not comport with the architec-

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CONSTITUTIONAL COMMENTARY 87 (1992); Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); William A. Walker, Review, 88 MICH. L. REV. 1409 (1990); Akhil Reed Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Sanford Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); F. Smith Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Don B. Kates, "The Second Amendment: A Dialogue" in 49 LAW & CONTEMPORARY PROBLEMS 143 (1986); Robert Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Stephen Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203 (1983).

[7]Richard Aborn, "The Battle over the Brady Bill and the Future of Gun Control," 22 Fordham Urb. L.J. 417 (1995) (president of Handgun Control, Inc.); Carl Bogus, "Race, Riots and Guns", 66 U.S.C. L. REV. 1365 (1993) (by member of the board of the Center to Prevent Handgun Violence), Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV. 5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Spannaus, State Firearms Regulation and the Second Amendment, 6 HAMLINE L. R. 383 (1983) (article by anti-gun politician); Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. 141 (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns).

ture of the Bill of Rights. As stated in an unchallenged passage of the dissent in *Verdugo-Urquidez* (494 U.S. at 288), "the Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing." Indeed, this truism was officially avowed by the First Congress in transmitting the Bill of Rights to the states for ratification.[8]

This Court has repeatedly recognized this truism in construing provisions of the Bill of Rights, including the Second Amendment, specifically, as well as the First Amendment. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 551-53 (right of assembly and right to arms are preexisting rights not created by the Bill of Rights). See also the language Justice Scalia quoted from a Second and Fourth Amendment case:

> "The law is perfectly well settled that the . . . Bill of Rights were not intended to lay down any novel principles of government, but simply to embody certain

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[8] Michael Kent Curtis, "The Curious History of Attempts to Suppress Antislavery Speech, Press and Petition in 1835-37, 89 NW. U. L. REV. 785, 794 (1995) (quoting Bill of Rights transmission document); see also Randy E. Barnett, "Foreword: Unenumerated Constitutional Rights and the Rule of Law", 14 HARV. J. L. & PUB. POLICY 615, 627, 629 (1991) (quoting First Congress debate), Malcolm, TO KEEP AND BEAR ARMS, above, pp. 145, 149 and fn. 72, Philip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," 102 YALE L. J. 907, 908, 915 (1993); Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309, 300 (1990); Suzanna Sherry, "The Founders' Unwritten Constitution," 54 U. CHI. L. REV. 1127, 1166, 1177 (1987); Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 HARV. L. REV. 149, 152-53 (1928) and citations there given.

guarantees and immunities which we had inherited from our English ancestors."[9]

In James Madison's notes presenting the Second Amendment to Congress, he indicated the Amendment was derived from the English Bill of Rights, which was phrased in purely individual terms: "the subjects which [sic] are Protestants may have arms for their defense . . . "[10] Madison emphasized the Amendment would guarantee the right to arms of all Americans, regardless of religion, and that it was binding on Congress, whereas the English right to arms applied only against the king, not Parliament.[11]

III

THE NINTH CIRCUIT PANEL'S DECISION CONTRADICTS THIS COURT'S PRIOR ANALYSES OF THE SECOND AMENDMENT

A. IN *UNITED STATES v. MILLER*, THIS COURT IMPLIEDLY RECOGNIZED A PERSONAL RIGHT IN THE SECOND AMENDMENT

The Ninth Circuit panel's opinion rests entirely upon a misinterpretation of this Court's decision in *United States v.*

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[9] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1052 (1991, Scalia, J. concurring) (emphasis added) quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

[10] Don B. Kates, 82 MICH. L. REV. at 235-39.

[11] *Id.* at 237, fn. 144 (the English Bill of Rights stated only the rights of Englishmen against the king). These points were also emphasized in the first legal commentary on the Second Amendment, Justice St. George Tucker's 1803 edition of Blackstone with notes on American law. He annotates Blackstone's discussion of the right to arms in English law ("among the absolute rights of individuals") with the observation that in the United States this right has been constitutionalized, citing the Second Amendment. *Id.* at 251-42.

Miller, 307 U.S. 174 (1939), as well as upon a misunderstanding of the basic facts of *Miller*.

Oddly, the panel opinion lays great weight on what it calls "a famous passage" in *Miller* wherein this Court invoked the militia clause to define what kinds of arms the Second Amendment protects.[12] Odder yet, the panel fails to cite the case which this Court itself cited in support of this passage; namely, "*Aymette v. State*, 2 Humphreys (Tenn.) 154, 158."[13]

What is implicit in *Miller*, and explicit in *Aymette*, is that "every free white man may keep and bear arms" of the kind that form "part of the ordinary military equipment." Thus, "weapons which are usually employed in private broils and which are efficient only in the hands of the robber and assassin," such as "a spear concealed in a cane", "bowie knives", and "Arkansas tooth-picks" are not protected under the Second Amendment.[14]

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[12]The panel quotes the following from *Miller*, 307 U.S. at 178: "[i]n the absence of evidence tending to show that the possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

[13]307 U.S. at 178, citing *Aymette* whose Tennessee citation is 21 Tenn. 152. *Aymette* is reproduced (from the reporter in which the U.S. Supreme Court cited it) in vol. 1 of Robert J. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993) pp. 2-10. *Aymette* is discussed with its background and its progeny, in Reynolds, above, 61 TENN. U. L. REV. 647.

[14]*Aymette* discusses "free white men" because the right to arms provision of the Tennessee constitution was so limited. And it was limited to the right to possession of arms for "the common defense." Yet *Aymette* flatly recognized that the right was an individual one to possess arms, the limitations going only to the kind of arms, *i.e.*, that they be limited to those appropriate for defense. As to such arms, "The *citizens* have the ***unqualified right*** to ***keep*** the weapon . . . ." 2 Humph. at 160

In citing *Aymette* and adopting its standard, this Court recognized in *Miller* that an individual right to possess arms is guaranteed, limited only by the exclusion of "gangster" weapons such as sawed off shotguns, brass knuckles, garrotes, black jacks and "Saturday Night Specials."[15]

In addition, the panel failed to quote or heed Miller's equally famous discussion of who the militia are and who owns its arms:

> The signification attributed to the term "militia" appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense . . . and further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 179.

(underlining Petitioner's, italics by the court). The quotations Petitioner has given in the text are from p. 158, the page cited by *Miller*, but the examples are taken from the kinds of arms prohibited by the Tennessee statute involved in *Aymette*, or from the opinion itself.

[15]Because Petitioner has quoted only the portion of *Miller* quoted by the panel, he has omitted the last sentence of the paragraph. It reads "Certainly it is not within judicial notice that this weapon [sawed off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense", and is followed by the citation to *Aymette*. The same phrase, "the ordinary military equipment" was used in *Aymette* to define the kinds of arms which are guaranteed to individuals.

For a discussion of the kinds of arms *Miller* implies are not protected by the Amendment, see Don B. Kates, 82 MICH. L. REV. at 260 (also suggesting further and additional principles limiting the kinds of arms the Amendment covers).

Thus, to harmonize the Amendment's militia clause with the "right of the people" phrase, requires no more than to recognize that the militia is the people and its arms are their arms. In guaranteeing the right to keep and bear arms to the people, the Amendment simply guarantees the arms of the militia — the people — against confiscation.

Were the panel's interpretation of *Miller* correct, *i.e.*, that respondent Jack Miller did not have standing under the Second Amendment, then this Court should have simply stated Jack Miller did not have standing to attack his indictment under the Second Amendment. Why was Jack Miller permitted to make a Second Amendment challenge, his claim being rejected only for lack of evidence that a sawed off shotgun was a militia-type weapon?

The answer cannot be that the *Miller* court was disinclined to dispose of substantive constitutional issues on standing grounds as the Ninth Circuit panel has done, for the *Miller* court had done so twice in that, and the preceding, Terms.[16]

Moreover, even if this Court had been disinclined to invoke standing, why did the *Miller* Court not simply resolve the substantive issue with a substantive decision to the effect that the Second Amendment did not protect Jack Miller's rights, but only those of states? Why did the *Miller* court go further and unnecessarily decide, instead, what standard applies to the kinds of firearm the Amendment protects?

The answer cannot be that the *Miller* Court was unacquainted with the states' right argument. The brief of the United States expressly urged that argument on the *Miller*

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[16] *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939) (electric power company has no standing to challenge TVA because it has "no legal right" to be free from competition), *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (same).

Court.[17] It was the individual right view which went unargued: Jack Miller had died and his side of the appeal went unbriefed.

It is also possible the panel's inconsistent conclusion was the result of a misunderstanding of the basic facts of *Miller*. Contrary to the panel's assertion, this Court in *Miller* did not uphold Jack Miller's conviction under the National Firearms Act, 26 U.S.C. Section 1132 (1932). In fact, the indictment against Mr. Miller was dismissed after the trial court ruled the National Firearms Act was contrary to the Second Amendment, and therefore unconstitutional, whereupon the U.S. attorney appealed the decision.[18] This factual misinterpretation may also explain the panel's statement that "no individual has ever succeeded in demonstrating such injury [to an interest protected by the Second Amendment] in federal court." In fact, Jack Miller succeeded in demonstrating such an injury at the trial level.

Petitioner respectfully submits the panel's reliance on *Miller* is not just baseless, but reaches a conclusion opposite to that which *Miller* implicitly embraced. The states/collective right theory was urged on this Court in *Miller*, but was not accepted. Ignoring the logically prior issue of whether there was a right, *Miller* focussed on what kind of firearm the right protects.

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[17] *United States v. Miller*, Brief of the United States [Summary of Argument]: "In both [England and the U.S.] the right to keep and bear arms has generally been restricted to the keeping and bearing of arms *by the people collectively* for their common defense and security. Indeed, the very language of the Second Amendment discloses that *this right has reference only to the keeping and bearing of arms by the people as members of the state militia* or other similar military organization provided for by law." Pp. 4-5 (emphasis added); see discussion in vol. 1 Robert J. Cottrol, GUN CONTROL AND THE CONSTITUTION, Introduction at xxvii (Garland, 1993).

[18] *Miller*, 307 U.S. at 176

The *Aymette* citation, and the passage defining the militia and its arms, make it clear the Amendment protects the right of individuals (from whom the militia must be drawn) to possess their private arms — which are the arms of the militia.

Finally, petitioner recognizes *Miller* can be read as just not addressing the issue of states' right versus individual right. Even so, such a reading still invalidates the Ninth Circuit panel's opinion because that opinion rests solely on construing *Miller* as adopting the state's right view. Since the panel's opinion is clearly based on a misinterpretation of *Miller*, the panel's opinion must fall of its own weight.

B. THIS COURT HAS ALSO IMPLIEDLY RECOGNIZED A PERSONAL RIGHT IN ITS LATER AND OTHER DISCUSSIONS REGARDING THE SECOND AMENDMENT

Footnote 5 of the Ninth Circuit panel's opinion asserts "The Supreme Court has not revisited the meaning of the Second Amendment except to cite *Miller*" in a footnote in a 1980 case.[19] This assertion is only true if the panel's "states' right" depiction of *Miller* is false. If *Miller* be deemed a states' right case, then this Court has twice revisited the issues in the 1990s without ever citing *Miller* — and in ways adverse to it. *Verdugo-Urquidez's* analysis indicates the Amendment secures a right to people (quoting a First

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[19]The panel cited *Lewis v. United States*, 445 U.S. 55, 65, n. 8 (1980) which, citing *Miller*, affirms that **felons and drug addicts** have no right to possess firearms (discussing federal laws barring them from doing so). Of course, this has no adverse implication for the right of law abiding, responsible adults to own firearms — any more than the exclusion of felons from the franchise implies that law abiding, responsible adults have no right to vote. It bears emphasis that many court of appeals opinions customarily cited as upholding the states' right view stand for nothing more than the exclusion of felons, without thereby impugning the individual right view of the Amendment.

Amendment case), a right that "protect[s] the people of the United States against arbitrary action by their own Government." *Verdugo- Urquidez*, 494 U.S. at 265 and 266 (referring to the Fourth Amendment after holding that it must be interpreted in *pari materia* with the First and Second).

Moreover, a 1992 opinion described the "full scope of liberty" guaranteed by the Constitution as including "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures".... *Planned Parenthood v. Casey*, 505 U.S. 833, 848, 120 L.Ed.2d 674, 696 (1992) (emphasis added), quoting earlier opinions. These 1990s opinions suggest an interpretation of the militia clause which conforms to that suggested by most scholars: As an amplification of the Amendment's purposes, not a limitation of its scope or meaning.[20]

In any event, the panel's denigration of the Second Amendment as a mere states' right, which has no relevance to private citizens, is wholly inconsistent with these 1990s opinions which analogized the Second Amendment to the First and Fourth Amendments.

Nor do these 1990s opinions stand alone. They are part of an almost 150-year tradition of opinions by this Court discussing the right to arms interchangeably with other personal right provisions of the Bill of Rights, and applying the same principles to them all. As an argumentum *ad horribilis*, Chief Justice Taney's opinion in Dred Scott

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[20] *I.e.*, the militia clause merely emphasizes the militia's composition from the individually armed citizenry as one of several reasons for guaranteeing individuals the right to arms. It does not thereby deny the other, and related, reasons: the individual right to arms as implicit in the cardinal right of self-defense (Locke, Montesquieu, Blackstone) from which right Locke derived his theory of the right of resistance to tyranny. 9 CONST. COMM. 89-97.

emphasized that if blacks could be citizens they would enjoy all the rights of citizens, including "the full liberty of speech . . . and to keep and carry arms wherever they went." *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1858), Petitioner's emphasis; see also p. 450 for the observation: "Nor can Congress deny the people the right to keep and bear arms, the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding." To the same effect are *Cruikshank*, *supra*, 92 U.S. 542 (identical rule applied identically to right to arms and right to assemble), *Presser v. Illinois*, 116 U.S. 252 (1886) (same), *Miller v. Texas*, 153 U.S. 535, 538 (1894) (Second and Fourth Amendments), *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (Second Amendment and rest of Bill of Rights).

IV

THE "STATES' RIGHTS" ANALYSIS ADOPTED BY THE NINTH CIRCUIT PANEL WAS UNKNOWN TO THE FOUNDERS, AS IT WAS FOR A CENTURY THEREAFTER

The very concept that the right to arms is a "states' right" is a product of the modern gun control movement. The Founders were not even aware of any such concept; neither, as the opinions of this Court, just cited, exemplify, was any court or legal commentator for more than a century after the Amendment's enactment. An eminent constitutional scholar has recently quoted a preeminent historian of the Amendment as follows:

> "In recent years it has been suggested that the Second Amendment protects the "collective right" of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and rati-

> fied, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis."[21]

Consider how the Amendment was explained in a commentary which was before Congress when it voted on the Bill of Rights, and endorsed by Madison himself: "the people are confirmed by the next article in their right to keep and bear their private arms."[22] Anti-Federalist editorialists concurred, supporting the Amendment while accusing Madison of plagiarizing it from a proposal by their champion, Sam Adams, that "peaceable citizens" be guaranteed in the possession of "their own arms."[23]

Planned Parenthood and the other opinions by this Court, cited above, only follow the example of Madison and the other Founders in discussing the right to arms interchangeably with the freedoms of speech, religion and press, describing them all jointly as "human rights", "private rights", etc.[24]

The states' right concept was no less foreign to 19th Century analysts. They uniformly addressed the Amendment as an individual right, often in tandem with the First

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[21] Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. at n. 19, quoting Stephen Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT.

[22] "Remarks on the First Part of the Amendments to the Federal Constitution", PHILADELPHIA FEDERAL GAZETTE, June 18, 1789, p. 2, col. 1 (emphasis added), by Madison's fellow-Federalist, Tench Coxe, an article on which Madison later pronounced his imprimatur. 82 MICH. L. REV. at 223-25.

[23] *Id.*

[24] D. Kates, 82 MICH. L. REV. at 223-25 and 228-29.

and Fourth Amendments.[25] For instance, Mr. Justice Story's influential treatises described it as guaranteeing "The right of the citizens to keep and bear arms" and explained its purpose in terms the classically educated Founders took as an elementary historical truth: "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."[26]

Moreover, in 1866, 1941 and 1986 Congress recognized "the rights of citizens — to keep and bear arms under the second amendment to the United States Constitution."[27]

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[25]See D. Kates, 82 MICH. L. REV. 244-247 (citing St. G. Tucker [1803] and Rawle [1825]); Sanford Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637, 649-50 (1989) (citing Story [1833]; Cooley [1898] and Shroeder [1904]); Halbrook, *supra* at 101-04 (citing Spooner [1845] and Tiffany [1849]); Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment", 101 YALE L. J. 57, 84, (1993) (Citing Farrar [1867]); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONSTITUTIONAL COMMENTARY 87, n. 1 (1992) (citing Pomeroy [1868], von Holst [1885], Schouler [1897], J. Tucker [1899], Putney [1908] and Black [1910]).

[26]Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added) and A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1834). Compare Aristotle's comment that free governments glory in arming their citizens while oligarchies and tyrants "mistrust the people and therefore deprive them of their arms." — POLITICS 218 (J. Sinclair trans., 1962). See Aristotle's discussions of how the confiscation of the Athenians' personal arms had led to the tyrannies of the Pisistratids and the Thirty. (Cited at 82 MICH. L. REV. 231-33 along with other philosophers who taught the Founders that only armed citizens could preserve their liberties — Plato, Cicero, Machiavelli, Thomas More, Hobbes, Harrington, Locke, Trenchard, Montesquieu, Blackstone and Rousseau.)

[27]Quoting Firearms Owners' Protective Act § (b), 100 Stat. 449 codified at 18 U.S.C. § 921 *et seq.* For further details on this and

Nor was this merely a bare finding, unsupported by evidence. Unlike the Ninth Circuit panel opinion, or the opinions of other courts of appeals cited therein, Congress' 1986 finding is informed by a detailed Senate Judiciary Committee Report covering the historical and philosophical background, as well as the legal precedents and legal commentary.[28] Petitioner respectfully submits this Report is another, and separate, authority impugning the panel's conclusions.

But even if no weight need be attached to the Report, findings of Congress which imply or involve interpretation or pronouncement as to constitutional meaning carry at least as much weight as do the opinions of the courts of appeal. Congressional interpretations of a constitutional provision do not bind this Court (and this is especially true of narrow interpretations of the Bill of Rights[29]). But congressional interpretation is "persuasive" and "entitled to great consideration."[30]

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preceding Congressional interpretations see Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 TENN. L. REV. 597 (1995).

[28] 97th Congress, 2d Session: REPORT OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE OF THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS (Committee Print 1982).

[29] *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989) (though deference is due to Congressional findings, particularly when they support the constitutionality of a challenged enactment they cannot supersede the Court's duty to vindicate First Amendment rights).

[30] *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869), *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("great respect"), *Franklin v. Massachusetts*, 505 U.S. 788, 803-04, 120 L. Ed. 2d at 652 (1992) ("persuasive"), *Ray v. Blair*, 343 U.S. 214 (1952), *Murray's Lessee v. Hoboken Land & Improvement*, 59 U.S. 272, 277 (1865) and authority there cited.

V

CONCLUSION

Perhaps the most important point is that offered in defense of the Warren Court's criminal justice decisions by its most conservative justice: It is essential for the people to see that judges do not just pick and choose among the Bill of Rights according to their personal preferences, but rather that judges preserve the document as a whole. If the privilege against self-incrimination (or the right to arms) is to be removed from the Bill of Rights, it must be done by formal amendment as specified in the Constitution, not by judges acting as policy-makers. *Ullman v. U.S.*, 350 U.S. 422, 427-428 (1956) (per Frankfurter, J.).

That is the magnitude of the issue involved here. There is no way to square the Ninth Circuit panel's view with Mr. Justice Story's explanation that the Amendment reflects the Founders' deep concern to preclude "One of the ordinary modes, by which tyrants accomplish their purpose without resistance [which] is, by disarming the people and making it an offense to keep arms." A FAMILIAR EXPOSITION OF THE CONSTITUTION 264 (1834) (emphasis added).

For the foregoing reasons, it is respectfully requested that this Court grant this Petition for Writ of Certiorari and finally resolve the increasingly divisive and contentious issue of whether individuals have standing under the Second Amendment to enforce the right to keep and bear arms.

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In propria persona

APPENDIX

No. 94-55836.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1995.

Decided April 5, 1996.

DOUGLAS RAY HICKMAN,
Plaintiff-Appellant,

v.

SHERMAN BLOCK; CLAUDE L. FARRIS; PATRICK G. LEONARD; CITY OF LOS ANGELES; DARRYL GATES, POLICE CHIEF; ROBERT TALCOTT; HERBERT BOEKMANN; REVA B. TOOLEY; SAMUEL L. WILLIAMS; STEPHEN D. YSLAS; WILLIAM COWDIN; FRANK E. PIERSOL; DOMINICK J. RIVETTI; CITY OF SAN FERNANDO; COUNTY OF LOS ANGELES,
Defendats-Appellees.

Plaintiff sued cities, county, and officials following denial of his applications for concealed firearms permit. The United States District Court for the Central District of California, Robert M. Takasugi, J., granted summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that Second Amendment right to bear arms is a right held by states and does not protect possession of weapon by a private citizen, and thus plaintiff lacked standing to sue.

Affirmed.

1. Weapons — 1

Second Amendment's right to bear arms is a right held by states, and does not protect possession of weapon by private citizen. U.S.C.A. Const.Amend. 2.

2. Federal Courts — 12.1

Existence of a case or controversy is a jurisdictional prerequisite. U.S.C.A. Const. Art 3, § 2, cl. 1.

3. Federal Civil Procedure — 103.2

Party invoking federal jurisdiction has burden to establish his standing to sue.

4. Federal Civil Procedure — 103.2, 103.3

For plaintiff to have standing to sue, plaintiff must have suffered injury to a legally protected interest that is both concrete and particularized, there must be a causal connection between injury and conduct complained of, and injury must be redressable by a favorable judicial decision; injury must be both concrete and particularized, and actual or imminent rather than conjectural or hypothetical.

5. Constitution Law — 42.3(1)

States alone stand in the position to show legal injury when right to bear arms is infringed, and thus only states have standing to sue. U.S.C.A. Const.Amend. 2.

6. Constitutional Law — 72

Decisions as to composition, training, equipping, and control of a military force are essentially professional military judgments, and as such are nonjusticiable.

Richard J. Hopkins, Law Office of Richard Hopkins, Simi Valley, California, for plaintiff-appellant.

Randel L. Ledesma, Greines, Martin, Stein & Richland, Beverly Hills, California, for defendants-appellees County of Los Angeles, and Sherman Block.

Donna Weisz Jones, Deputy City Attorney, Los Angeles, California, for defendant-appellee City of Los Angeles.

Kevin H. Louth, Arthur G. Lesmez, and Joseph Zamora, Liebman, Reiner, Nashison & Walsh, Los Angeles, California, for defendants-appellees City of San Fernando and Rivetti.

Don B. Kates, Benenson & Kates, Novato, California, for amici.

Appeal from the United States District Court for the Central District of California Robert M. Takasugi, District Judge, Presiding, No. CV-91-05594-RMT(Bx).

Before: HALL and NOONAN, Circuit Judges, and SHUBB,* District Judge.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Douglas Ray Hickman appeals from an order granting summary judgment in favor of the appellees, who denied Hickman a concealed weapons permit. He complains, among other things, that the appellees' permit issuance policy violated his Second Amendment right to bear arms. We have jurisdiction over his timely appeal pursuant to 28 U.S.C. section 1291, and affirm on the basis that Hickman lacks standing to sue for a violation of the Second Amendment.

I

Hickman owns and operates a responding security alarm company.[1] He is also a federally licensed dealer. Wishing to break into the lucrative filed of "executive protection," Hickman submitted a string of applications for a concealed firearms permit to the appellee municipal authorities. When the authorities denied Hickman's applications, he filed this

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* Hon. William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

[1]Under California law, this entitles Hickman to carry an exposed firearm while he is in uniform. *See* Cal.Penal Code § 12031(d).

suit for damages and injunctive relief, arguing several theories of liability under 42 U.S.C. sections 1983 and 1985(3). We considered and rejected in a unpublished memorandum disposition all of Hickman's various arguments save one: his claim for relief under section 1983 based on a violation of the Second Amendment. This issue we now address. Only appellees County of Los Angeles, City of San Fernando, and their named officials remain as parties to the action.

The appellees issued concealed firearms permits under the authority of a California statute which provides, in relevant part:

> The sheriff of a county or the chief or other head of a municipal police department of any city or city and county; upon proof that the person applying is of good moral character, that *good cause* exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person . . .

Cal.Penal Code § 12050(a)(1) (emphasis added). The County and San Fernando share in common a policy concerning the requirements of "good cause." Under the policy, good cause is shown by

> convincing evidence of a clear and present danger to life . . . which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

The policy also requires some proof of firearms training. Finally, the policy provides that "[n]o position or job classification in itself should constitute good cause for the issuance or denial of a license." Each application is to be reviewed individually for cause.

Hickman first applied for a permit in 1988. He applied to each of the appellees in turn, stating that he required a permit in order to work as a private bodyguard. The County and San Fernando denied his applications on the grounds that Hickman, having cited no "clear and present danger" to personal safety, had failed to show good cause. Hickman next attempted to obtain a permit in 1989 by joining a reserves unit for the San Fernando police department.[2] For reasons not clear in the record, San Fernando denied him admission to the reserves and blocked this approach to a permit.[3]

Hickman submitted his final round of permit applications in 1991, following two incidents which, he felt, amounted to a showing of good cause. First, Hickman reported being "approached" by two "Hispanic men" while he loaded ammunition into his car. He frightened them away by raising an unloaded pistol. Second, Hickman recited an isolated threat by a disgruntled ex-employee, who allegedly said: "I know where you live;" "You will have to look over your shoulder for the rest of your life;" and "I will get you and it won't even be me." On the force of these incidents Hickman reapplied to the County and San Fernando. The County denied Hickman's application for failure to show cause and San Fernando apparently failed to respond.

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[2]At oral argument, Hickman's attorney denied that his client had attempted to join the reserves to obtain a permit. However, in his 1991 permit re-application to the County. Hickman stated that his "ulterior motive" for applying to the reserves had been to obtain a permit. Police officers obtain their concealed weapons authorization under a separate statute, which does not demand a showing of good cause. *See* Cal.Penal Code § 12031(b). Hickman does not attack the preferential access of police officers to concealed weapons permits in this lawsuit.

[3]According to Hickman, the San Fernando Police cited a potential conflict of interest between Hickman's private security operation and his official duties. San Fernando maintains that it rejected Hickman's application after uncovering his ulterior motive.

Hickman next went to court; he filed this lawsuit in October 1991. In March 1992 the district court granted the County's motion to dismiss Hickman's action to the extent that it was based upon a violation of the Second Amendment. It also denied his section 1985(3) conspiracy claim. The City of Los Angeles, having been a party only to the conspiracy claim, was then dismissed as a party to the suit. In July 1992 the County moved for summary judgment on the remaining claims. Discovery ensued. San Fernando joined in the County's motion. In May 1994 the district court entered its final order granting summary judgment for the remaining appellees: the County, San Fernando and their respective municipal officers.

II

[1] The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Hickman argues that the Second Amendment requires the states to regulate gun ownership and use in a "reasonable" manner. The question presented at the threshold of Hickman's appeal is whether the Second Amendment confers upon individual citizens standing to enforce the right to keep and bear arms. We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen. We conclude that Hickman can show no legal injury, and therefor lacks standing to bring this action.

[2] Article III of the Constitution restricts the federal courts to adjudicating actual "cases" or "controversies." This limitation "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Among

the cluster of doctrines that ensure our adherence to the case-or-controversy requirement, the "doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important." *Id.* Article III standing is a jurisdictional prerequisite, *See id.* at 754, 104 S.Ct. at 3326. Thus, we are bound to address the standing issue at the threshold of the case.

[3, 4] The party invoking federal jurisdiction has the burden to establish his standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). To do so, a litigant must satisfy three elements which constitute the "irreducible constitutional minimum" of Article III standing. *Id.* First, the plaintiff must have suffered injury to a legally protected interest. *Id.* This injury must be both "concrete and particularized," *id.* (citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41, 92 S.Ct. 1361, 1368-69, 31 L.Ed.2d 636 (1972)), and "actual or imminent" rather than "conjectural or hypothetical." *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)) (internal quotations omitted)). Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976)). Third, the injury must be redressable by a favorable judicial decision. *Id.* (citing *Simon*, 426 U.S. at 38, 96 S.Ct. at 1924).[4]

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[4] In addition to its constitutional components, standing doctrine also includes several "judicially self-imposed" constituents, grounded in comity and prudence. *Wright*, 468 U.S. at 751, 104 S.Ct. at 3324. We need not address these elements here, however.

This case turns on the first constitutional standing element: whether Hickman has shown injury to an interest protected by the Second Amendment. We note at the outset that no individual has ever succeeded in demonstrating such injury in federal court. The seminal authority in this area continues to be *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), in which the Supreme Court upheld a conviction under the National Firearms Act, 26 U.S.C. § 1132 (1934), for transporting a sawed-off shotgun in interstate commerce. The Court rejected the appellant's hypothesis that the Second Amendment protected his possession of that weapon. Consulting the text and history of the amendment, the Court found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia. In a famous passage, the Court held that

> [i]n the absence of any evidence tending to show that the possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

307 U.S. at 178, 59 S.Ct. at 818.[5] The Court's understanding follows a plain reading of the Amendment's text. The Amendment's second clause declares that the goal is to preserve the security of "a free state;" its first clause establishes the premise that a "well-regulated militia" is necessary to this end. Thus it is only in furtherance of state

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[5]The Supreme Court has not revisited the meaning of the Second Amendment except to cite *Miller* for the proposition that federal restrictions on the use of firearms by individuals do not "trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n. 8, 100 S.Ct. 915, 921 n. 8, 63 L.Ed.2d 198 (1980) (upholding 18 U.S.C. App. § 1202(a)(1)).

security that "the right of the people to keep and bear arms" is finally proclaimed.[6]

[5] Following *Miller*, "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right." *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied* 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); *see also Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir.1984) (same, citing *Warin*); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir.1974) (cited with approval in *Lewis*, 445 U.S. at 65 n. 8, 100 S.Ct. at 921 n. 8) (same). Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed.

Nevertheless, Hickman argues that under the Second Amendment, individuals have the right to complain about the manner in which a state arms its citizens. We fail to see the logic in this argument. The Second Amendment creates a right, not a duty. It does not oblige the states to keep armed militia,[7] or to arm their citizens generally, although some states do preserve, nominally at least, a broad individ-

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[6] The Constitution provided for armed militia because "[t]he sentiment of the time strongly disfavored standing armies. . . ." *Miller*, 307 U.S. at 179, 59 S.Ct. at 818. Under the resultant constitutional scheme. Congress had power to raise an army if circumstances required, however "the common view was that adequate defense of country and laws could be secured through the Militia — civilians primarily, soldiers on occasion." *Id.; see also Perpich v. Dept. of Defense*, 496 U.S. 334, 340, 110 S.Ct. 2418, 2422-23, 110 L.Ed.2d 312 (1990) (discussing constitutional compromise of state sovereignty, individual liberty and necessity of common defense which resulted in provision for both a national army and state militia).

[7] Although *Congress* may do so. *See* U.S. Const. art. I, § 8, cls. 15-16 (Militia Clauses); *Miller*, 307 U.S. at 178, 59 S.Ct. at 818 (discussing division of power over the militia between Congress and the states); *Perpich*, 496 U.S. at 340, 110 S.Ct. at 2422-23 (same); *Select Draft Law*

ual right to bear arms as a foundation for their state militia.[8] *See, e.g., People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975) (en banc) (citing Colo. Const. art. II, § 13) (recognizing individual right to bear arms under state constitution); *State v. Amos*, 343 So.2d 166, 168 (La.1977) (citing La. Const. art I, § 11) (same proposition); *State v. Krantz*, 24 Wash.2d 350, 164 P.2d 453 (1945) (citing Wash. Const. art I, § 24) (same proposition); *Akron v. Williams*, 113 Ohio App. 293, 177 N.E.2d 802 (1960) (citing Ohio Const. art. I, § 4) (same proposition). Even in states which profess to maintain a citizen militia, an individual may not rely on this fact to manipulate the Constitution's legal injury requirement by arguing that a particular weapon of his admits some military use, or that he himself is a member of the armed citizenry

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Cases, 245 U.S. 366, 383, 38 S.Ct. 159, 163, 62 L.Ed. 349 (1918) (same).

[8] Originally, in the American Colonies of the 17th Century, "as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense." *Miller*, 307 U.S. at 179-80, 59 S.Ct. at 818. To ensure the readiness of their militias, the colonies enacted laws "intended to assure the possession of arms and ammunition by all who would be subject to military service." *Id.* at 180, 59 S.Ct. at 818-19. The Second Amendment preserved the right of the new American states to continue this practice.

Likewise, in the early days of the Republic, Congress passed a statute to establish "an Uniform Militia throughout the United States" by requiring universal self-armament for men of appropriate age. *Perpich*, 496 U.S. at 341, 110 S.Ct. at 2423 (discussing 1 Stat. 271). In practice the command was ignored, and so in 1901 President Theodore Roosevelt and the Congress embarked on the establishment of the modern National Guard system. *Id.* at 341-43, 110 S.Ct. at 2423-24.

Today, federal law continues to assure that "in addition to its National Guard, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States." *Id.* at 352, 110 S.Ct. at 2429 (citing 32 U.S.C. § 109(c) (1990)).

from which the state draws its militia. *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978) (technical membership in state militia insufficient to show legal injury under Second Amendment); *Warin*, 530 F.2d at 106 (same with respect to individual "subject to enrollment" in state militia); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (same, citing *Warin*); *United States v. Graves*, 554 F.2d 65, 66 n. 2 (3rd Cir. 1977) (en banc) (narrowly construing the Second Amendment "to guarantee the right to bear arms as a member of a militia").

[6] Hickman's claim amounts to a "generalized grievance" regarding the organization and training of a state militia. *See Lujan*, 504 U.S. at 575, 112 S.Ct. at 2144. We do not involve ourselves in such matters. As the Supreme Court has observed, "decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," and as such are nonjusticiable. *Gilligan*, 413 U.S. at 10, 93 S.Ct. at 2446. "[I]t is difficult to conceive of an area of governmental activity in which the court have less competence." *Id.* For this reason, among others, we leave military matters to the elected branches of government.[9] *See id.*

III

Because the right to keep an armed militia is a right held by the states alone, Hickman has failed to show "injury" as

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[9]For similar reasons we do not involve ourselves in nonjusticiable areas of social policy. Amici argued at length that widely diffused gun ownership is good social policy. We are in no position to accept or reject this claim.

required by constitutional standing doctrine. Accordingly we have no jurisdiction to hear his appeal.[10]

The judgment is AFFIRMED.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 12050. Issuance of licenses; qualifications of licensee; restrictions, conditions, prohibitions, revocations; amendments to licenses; changes in addresses; renewals

(a)(1) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver, or other

---

[10]Moreover, even if we determined that Hickman had standing to sue for violation of the Second Amendment, his suit would nevertheless fail because the Second Amendment is not incorporated against the states. *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

firearm capable of being concealed upon the person in either one of the following formats:

(A) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) A license issued pursuant to this section is valid for any period of time not to exceed one year from the date of the license, or in the case of a peace officer appointed pursuant to Section 830.6, three years from the date of the license.

Supreme Court, U.S.
FILED
AUG 15 1996
CLERK

No. 96-109

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS RAY HICKMAN, in propria persona,

Petitioner,

vs.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS COUNTY OF LOS ANGELES AND SHERMAN BLOCK

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QUESTION PRESENTED

The petition requests this Court to consider the following question:

Whether the Second Amendment to the Constitution confers upon individual citizens standing to enforce a personal right to keep and bear arms.

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JURISDICTION

Respondents County of Los Angeles and Sherman Block do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Respondents County of Los Angeles and Sherman Block agree with petitioner that California Penal Code Section 12050 is relevant to these proceedings. The petition quotes the current version of the statute that was not in effect at any time relevant to petitioner's lawsuit. At the time of petitioner's applications, California Penal Code Section 12050(a) provided as follows:

> § 12050. Issuance of license; qualifications of licensee; restrictions or conditions
>
> (a) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to such person a license to carry concealed a pistol, revolver, or other firearm for any period of time not to exceed one year from the date of the license, or in the case of a peace officer appointed pursuant to Section 830.6, three years from the date of the license.

Cal. Penal Code § 12050(a) (West 1992).

STATEMENT OF THE CASE

Respondents County of Los Angeles and Sherman Block respectfully submit that the published opinion of the Ninth Circuit contains an accurate description of the proceedings below. Pet. App. 1a-12a.[1] For the record, respondents note the following corrections to petitioner's statement of the case:

1. Petitioner filed applications for concealed weapons licenses in 1988, 1989 and 1991 that were denied by respondents. In 1993, petitioner did obtain a concealed weapons license. Memo. Dec. at 2.

2. The petition's quotation of California Penal Code Section 12050 is inaccurate because it reflects amendments made to the statute in 1992 and 1993.

3. The procedural history regarding petitioner's efforts to seek rehearing is misstated in the petition..On April 19, 1996, the Ninth Circuit granted petitioner an extension of time until April 26, 1996, to file his petition for rehearing. On or about April 26, 1996, petitioner filed a petition for rehearing and request for hearing en banc which exceeded the Ninth Circuit's page limits. On May 6, 1996, the Ninth Circuit denied petitioner's motion to exceed the page limits and granted him leave to file a brief within the page limits by May 13, 1996. Petitioner failed to file his revised petition for rehearing within the

---

[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. ___." The Appendix to this Brief in Opposition is cited as "App. ___." The Ninth Circuit's unpublished Memorandum of Decision is cited as "Memo. Dec. ___."

deadline and on May 28, 1996, the Ninth Circuit denied petitioner's motion for leave to file his petition for rehearing.

REASONS FOR DENYING THE WRIT

THE ISSUE PRESENTED TO THIS COURT IS IRRELEVANT TO THE OUTCOME OF PETITIONER'S CASE.

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). As explained below, the petition raises an issue that was never raised below and would have no impact on the outcome of the underlying action.

A. As Detailed In His Own Appellate Briefs, Petitioner Never Contended Below That The Second Amendment Confers Individual Rights.

Until the publication of the Ninth Circuit's opinion, petitioner never raised the contention which he now identifies as the sole question to be presented to this Court. Indeed, in his reply brief in the Ninth Circuit, petitioner specifically stated that the *"question of whether the Second Amendment is an individual right or a collective right of the States . . . is entirely irrelevant to this appeal."* App. at 2 (emphasis added).

As petitioner explained to the Ninth Circuit, his challenge to the California licensing statute:

> exists entirely within the context of the California law regarding issuance of [concealed

> weapons] permits. It does not call into question the constitutionality of that law, nor does [petitioner's] Complaint assert a Second Amendment right to carry a concealed weapon without being licensed to do so by the State of California. Therefore it does not raise the issue of Individual rights over State rights.

App. at 3.

Simply put, petitioner asks this Court to grant certiorari on an issue which he never sought to litigate below.

B. The Petition For Certiorari Seeks Nothing More Than An Advisory Opinion.

Petitioner's arguments regarding the Second Amendment in the Ninth Circuit were directed to the issue of whether the Second Amendment limits only federal action or may be incorporated to actions of the states through the Fourteenth Amendment. App. at 7-8. In its opinion, the Ninth Circuit addressed and rejected petitioner's argument on the incorporation issue:

> Moreover, even if we determined that Hickman had standing to sue for violation of the Second Amendment, his suit would nevertheless fail because the Second Amendment is not incorporated against the states.

Pet. App. at 12a, n.10 (citation omitted).

Though he devoted all of his efforts in the Ninth Circuit to the incorporation issue, petitioner now disclaims any interest in that issue. Petitioner specifically apprises the Court that he is not asking:

> [T]his Court to make any determination with respect to a right of individuals to carry concealed firearms, nor to decide whether the Second Amendment protections apply to the states through the Doctrine of Selective Incorporation.

Pet. at 5.

As the Ninth Circuit has clearly held, petitioner cannot prevail in his lawsuit unless he prevails on the incorporation issue. By limiting his petition to the issue of standing, petitioner is asking this Court to grant certiorari on an issue that, even if he prevails, will not alter the outcome of his lawsuit. "No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885)). Petitioner's interest in the issue he has presented for review is purely academic and does warrant certiorari review by this Court.

CONCLUSION

For the reasons detailed above, respondents County of Los Angeles and Sherman Block respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Docket Number 94-55836

DOUGLAS RAY HICKMAN, PLAINTIFF/APPELLANT

vs.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REVA B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI, DEFENDANTS/APPELLEES,

---

APPEAL FROM DC# CV-91-5594 RMT
CENTRAL CALIFORNIA
Honorable Robert M. Takasugi, Judge

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II. STATES RIGHTS VERSES INDIVIDUAL RIGHTS IS NOT AN ISSUE IN THIS APPEAL, BUT THE SECOND AMENDMENT SHOULD GOVERN REVIEW OF A STATE'S ISSUANCE OF CCW PERMITS.

Appellees THE CITY OF SAN FERNANDO, et al., (collectively, "San Fernando") quote the Second Amendment ("the right of the people to keep and bear arms shall not be infringed"), and assert that this language does not grant a right to individual citizens to keep and bear arms, but only applies to the right of the States to maintain a militia. The question of whether the Second Amendment is an individual right or a collective right of the States, has been much debated[1], and was discussed in a recent opinion by this Court. *Fresno Pistol & Rifle Cub, Inc. v. Van de Kamp*, 965 F.2d 723 (1992). However, the issue is entirely irrelevant to this appeal.

The question of whether an Individual right or a State right was created by the Second Amendment arises only when an individual asserts a claim that he has a right that cannot be denied by the State, i.e., an *unregulatable* right, to own ("keep") and carry ("bear") arms. That is not a contention in this appeal. This appeal assumes (without necessarily agreeing) that the Second Amendment only empowers the States (as "the people") to "keep and bear arms[2]." But the States must do so through

---

[1] For a thorough historical review of this issue, *see*

[2] As a matter of exegesis, the phrase "keep and bear arms" implies that the Amendment intended an individual right, since, although States can own ("keep") arms, only individuals can actually carry ("bear") them. Notably, however, the Amendment says nothing about *using* arms, thereby leaving

individuals, and one way States do that is through the licensing of persons to carry concealed weapons.

Hickman's case exists entirely within the context of the California law regarding issuance of CCW permits. It does not call into question the constitutionality of that law, nor does his Complaint assert a Second Amendment right to carry a concealed weapon without being licensed to do so by the State of California. Therefore it does not raise the issue of Individual rights over States rights.

It does, however, raise the issue of *how* the States are administering their collective right to regulate the bearing of arms. The issue is whether the *States* may be regulated *by the Second Amendment* in their exercise of the collective right supposedly granted to them thereunder. May a State, without restrictions upon the discretion of its officials, forbid all or certain classes of individuals from licensed possession of concealed firearms, or create a selected elite who are the only ones permitted to carry concealed firearms, or otherwise discriminate against citizens of good moral character in issuing CCW permits? These questions arise from this appeal.

That States, if they are the sole recipients of the right to keep and bear arms under the Second Amendment, *must* license individuals to carry weapons in some reasonable manner appears to have been decided in the historic case of *Presser v. Illinois*, 116 U.S. 252, 265, (1886). The U.S. Supreme Court there stated:

---

regulation of that all-important facet of gun ownership to the States, through the Tenth Amendment.

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."

The pronouncement states concerns similar to those expressed in the Second Appellate District of the California Court of Appeal in *Salute v. Pitchess, supra,* 61 Cal.App.3d at 560: "[t]o determine in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally, and is an abuse of, and not an exercise of, discretion."

That concealed weapons may be effectively used "for maintaining the public security," and in "performing [the citizens'] duty to the general government," is indisputable. Hence, the holding of the U.S. Supreme Court in *Presser* requires that clear and appropriate restrictions be placed on the power of a State to issue, or refuse to issue, CCW Permits to citizens of good moral character. What those restrictions should be, and whether the Appellees' policy and practice violates those restrictions, are issues in this appeal.

Regarding appropriate restrictions, Hickman notes that concealed weapons to do not tend to inflame fear or

provoke tempers the way firearms do when they are carried openly. Also, if a weapon cannot be seen, it does not become an incentive to macho contests of speed and dexterity. Of course, carrying a concealed weapon involves a potential danger – the fact that its presence in a particular situation remains unperceived until it is brandished. Therefore, because of legitimate concerns for public safety, the question of whether a weapon can be carried openly or may be carried concealed has become the subject of differing regulations by the States. *See* e.g., *California Penal Code* §§ 12025 and 12031.

These regulations, and their application by officials of the State, should be subject to reasonable review under the Second Amendment, as indicated in the *Presser* decision, and it is just such a review, and nothing more, that Hickman requests of this Court, whether through the Fourteenth Amendment, or by "laying the constitutional provision in question out of view," 116 U.S. at 265, that is, on some other legal basis rooted in the power of the United States to ensure that its reserve militia is not impaired.

In such a review, the "good cause" requirement of *California Penal Code* § 12050 becomes a restriction which, if it is to survive at all, must be exercised so as not to "deprive the United States of their rightful resource." 116 U.S. at 265. It is also a restriction which should be examined in light of the stated purpose of the Second Amendment – "A well regulated Militia, being necessary to the security of a free State."

Appropriate restrictions on the right of a citizen to carry a concealed weapon, if her or she is of good moral

character[3], should reasonably include such factors as the degree of training in proper use of the weapon to be carried, and the likelihood that the citizen, or the citizen's family, might be exposed to breaches of "public security" (e.g., have they been threatened with criminal acts? or are they living, working or traveling in an area, or engaging in an occupation, that involves increased exposure to crime?).

Appropriate restrictions should *not* include any discriminatory preference for particular individuals or groups, and certainly there should be no preference for persons closely associated with the government that issues the licenses. The latter restriction works directly against one of the purposes of the reserve Militia, namely to allow free citizens to protect themselves from abuses by the State itself, or to protect the United States from such abuses. *See United States v. Miller,* 307 U.S 174, 182 fn. 3 (1939), citing 1 Cooley, Const. Lim. p. 729, and 2 Story, Const. 5th ed. p. 6465.

Governments have traditionally been fearful to give up this kind of power to the citizenry, and that reluctance is patent in the Appellees' restricted issuance of CCW Permits. But it is just such power that the Second Amendment requires them to disgorge. The restrictions that are appropriate to impose on the licensing activity of a State under the Second Amendment require that the Appellees

---

[3] Only persons of good moral character would make appropriate members of a reserve Militia. Hence, that requirement of California law appears, on its face, to be a reasonable restriction.

in this case issue CCW Permits to persons with Hickman's qualifications. Not to do so deprives the United States of a rightful resource for maintaining the public security, and therefore violates the Second Amendment irrespective of the issue of Individual verses States rights.

III. APPLICATION OF THE SECOND AMENDMENT THROUGH THE FOURTEENTH AMENDMENT IS APPROPRIATE UNDER *DE JONGE*.

Can this Court apply the Second Amendment to a review of the Appellees' administration of a California statute? Hickman contends, as suggested in *Presser*, this question may be answered in the affirmative on grounds other than the Fourteenth Amendment. But with respect to the issue of incorporation, it is true that the Fourteenth Amendment has not yet been used by the U.S. Supreme Court specifically to apply the Second Amendment to the States. That fact was pointed out by this Court in *Fresno Pistol & Rifle Club, Inc., supra*, 965 F.2d at 729, *et seq.* However, Hickman contends incorporation has been implied by a specific decision of the Supreme Court, and that argument was not addressed by this Court in the foregoing opinion.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), *both* the First Amendment right to peaceable assembly and the Second Amendment right to keep and bear arms were found to be inapplicable to the States through the Fourteenth Amendment. The reasoning of the Court in support of that decision was identical as to *both* of those rights. Subsequently, the test for applying portions of the Bill of Rights to the States was reversed by the Supreme Court so that the very reasoning used by the *Cruikshank* court in 1876 to exclude the peaceable assembly clause of

the First Amendment (and the Second Amendment!) from application to the States became the *basis* in 1937 for incorporation of that clause in the Fourteenth Amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

The issue of whether *Cruikshank's* holding in regard to the Second Amendment should also be overturned was not before the *De Jonge* court at that time, but if it had been, the result would necessarily have been the same. *De Jonge* effectively overrules *Cruikshank* on *both* the First Amendment right of peaceable assembly *and* the Second Amendment. Hence, this Court should follow *De Jonge* and find that the Second Amendment *is* applicable to the States through the Fourteenth Amendment.

The fact that *Presser v. Illinois, supra,* was cited in a footnote to *Malloy v. Hogan*, 378 U.S. 1, 4, fn.2 (1964), as noted by San Fernando, does not mean it is still good law on the issue of incorporation under the Fourteenth Amendment.[4] It was not cited for that point in the footnote. In fact, *Cruikshank* was mentioned in that footnote as an example of the Supreme Court's rulings on the First Amendment's applicability to the States, despite the fact that it was overruled by *De Jonge*.[5]

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[4] *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) involved a *federal* statute (the National Firearms Act), and hence did not address the issue of whether the Second Amendment is applicable to the States through the Fourteenth Amendment.

[5] As noted in Appellant's opening brief, *Cruikshank* applied at least one portion of the First Amendment (the right to petition the government for redress of grievances) to the States. It is most often cited for that holding.

MOTION FILED
AUG 19 1996

(3)

No. 96-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, *in propria persona*
Petitioner,

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, AND DOMINICK J. RIVETTI,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LAWYER'S SECOND AMENDMENT SOCIETY, LAW ENFORCEMENT ALLIANCE OF AMERICA AND DOCTORS FOR INTEGRITY IN POLICY RESEARCH, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF DOUGLAS RAY HICKMAN

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Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE LAWYER'S SECOND AMENDMENT SOCIETY, LAW ENFORCEMENT ALLIANCE OF AMERICA, AND DOCTORS FOR INTEGRITY IN POLICY RESEARCH IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This motion of The Lawyer's Second Amendment Society (LSAS), Law Enforcement Alliance of America (LEAA) and Doctors for Integrity in Policy Research (DIPR) for leave to file the annexed brief *amicus curiae* is respectfully submitted pursuant to Supreme Court

Rule No. 37. Consent to the filing of this brief has been granted by Petitioner, and by counsel for Respondent County of Los Angeles, and these have been lodged with the Clerk of this Court. Consent has been withheld by counsel for Respondents City of San Fernando and Dominick J. Rivetti.

The Lawyer's Second Amendment Society (LSAS) is a non-profit California corporation headquartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical scholarship on the topic and stimulating greater public knowledge and understanding of such scholarship, and participating in litigation regarding the Second Amendment.

The LSAS's policies are set by its Board of Directors, which consists only of attorneys. LSAS's Board evaluate the merits of any contemplated legal action and authorizes such action only where the LSAS's position will help establish the American people's right to keep and bear arms for self defense. The LSAS's Board has authorized the filing of an amicus curiae brief in this matter. LEAA's and DIPR's Boards of Directors have also authorized filing of an *amicus* brief in this matter.

Amici seek here to augment the argument in the petition for writ of certiorari. *Amici* believes their public policy perspective and litigation experience in support of Second Amendment rights will provide an additional viewpoint with respect to the constitutional issues presented.

The present case involves a Ninth Circuit Court of Appeals decision in which the panel held the Second Amendment to the United States Constitution does not confer upon individual citizens standing to enforce a personal right to keep and bear arms.

The *amici* believe the opinion below is in direct conflict with the plain meaning of the Second Amendment. Indeed, *amici* suggest the Ninth Circuit panel's holding that the Second Amendment guarantees only a "state's right" to maintain a militia is incorrect by virtue of the fact the Second Amendment is an integral part of the Bill of Rights, which, above all else, set forth, and guarantee, individual's rights vis-a-vis the government.

If allowed to stand, the opinion below will constitute a serious setback for individual rights, perhaps one of the most egregious such setbacks this century, by eliminating an important and time-honored right with the stroke of a pen.

For the foregoing reasons, The LSAS, LEAA and DIPR request that this motion for leave to file the annexed brief *amicus curiae* be granted.

DATED: August 16, 1996

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No. 96-109

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OCTOBER TERM, 1996

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Petitioner,

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, AND DOMINICK J. RIVETTI,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONER DOUGLAS RAY HICKMAN

INTERESTS OF THE AMICI

1. Amicus THE LAWYER'S SECOND AMENDMENT SOCIETY

THE LAWYER'S SECOND AMENDMENT SOCIETY (LSAS) is a non-profit California corporation headquartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical schol-

arship on the topic and stimulating greater public knowledge and understanding of such scholarship. LSAS's specific activities include writing articles and research pieces for publication in legal and other periodicals, providing speakers on the issue of the individual right to keep and bear arms, publication of its newsletter, entitled, "The Liberty Pole," and participating in litigation regarding the Second Amendment.

2. Amicus LAW ENFORCEMENT ALLIANCE OF AMERICA

The Law Enforcement Alliance of America (LEAA) is a non-profit, non-partisan advocacy organization made up to tens of thousands of law enforcement professionals, crime victims, and concerned citizens dedicated to making America safer. LEAA represents its members' interests by assisting law enforcement professionals, securing victims' rights over criminals' rights, seeking criminal justice reforms that target violent criminals, not law-abiding citizens, and explaining, from a law enforcement perspective, why firearms regulation is not effective in controlling crime.

3. Amicus DOCTORS FOR INTEGRITY IN POLICY RESEARCH

Doctors for Integrity in Policy Research, Inc. (DIPR), a non-profit corporation, is a national "think tank" of medical school professors, researchers, and practicing physicians who are committed to exposing biased and incompetent research, editorial censorship, and unsound public policy. DIPR conducts review research, publishes and publicizes its findings, and, to promote sound public policy, testifies before Congressional and other legislative committees and participates in litigation.

DISCUSSION

I. INTRODUCTION

It cannot be doubted that one of the most contentious and polarizing issues of our day is whether the Second Amendment to the United States Constitution confers upon individuals the personal right to keep and bear arms for self defense.

Gun control proponents vigorously assert the Second Amendment merely codifies a "state's right," and further, that if individuals do enjoy a right under that Amendment, society's need to protect its members justifies any infringement on that right.

On the other hand, self-defense and pro-firearms activists suggest with equal vigor that the Second Amendment clearly and expressly recognizes an individual and inalienable right to keep and bear arms for the purpose of defending one's self, one's family and one's home.

Surprisingly, despite the increasing cacophony of the debate, this Court has yet to consider whether the Second Amendment guarantees an individual right, or a "states' right". On the few occasions the courts of appeals have considered the issue, they have reached contradictory and inconsistent results.

All the while, millions of Americans are becoming increasingly discontent with their government because they believe it is ignoring, or worse, denying the existence of, a basic right set forth in simple and plain English within the Second Amendment.

Amici respectfully suggest it is incumbent upon this Court, as the final arbiter of the Constitution and Bill of Rights, to resolve — once and for all — this increasingly divisive issue. Indeed, until such time as this Court permits the Second Amendment to take its rightful, logical and

historic place among the other personal freedoms and rights set forth in the Bill of Rights, this issue will remain as a persistent and recurrent problem.

It is also significant that, if the Court rules in conformity with the vast majority of scholarly research and holds the Second Amendment guarantees an individual right, such a ruling will not, *ipso facto*, invalidate any firearms laws. Rather, like all rights set forth in the Bill of Rights, the Second Amendment's right to keep and bear arms is subject to reasonable limitation. Before any gun control law could be invalidated, it would first have to be shown to *unreasonably* infringe on the individual's right to keep and bear arms.

For the above reasons, *amici* request that this Court grant Petitioner Douglas Ray Hickman's petition and issue its Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE CIRCUITS ARE SPLIT ON THE MEANING OF THE SECOND AMENDMENT

Of the 13 federal courts of appeals, 10 have spoken on the Second Amendment, one holding the right guaranteed is not an individual right (the 4th Circuit), four holding it is an individual right (the 1st, 5th, 10th, and 11th Circuits), four with cases going each way (the 3rd, 6th, 8th and 9th Circuits), and one not addressing the question (the 7th Circuit). The remaining three circuits (2nd, District of Columbia, and Federal) have been silent. All but two of three cases, however, preceded this Court's decision in *U.S.* v. *Verdugo Urquidez*, 110 S. Ct. 3039 (1990).

In *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom., Velazquez v. U. S.*, 319 U.S. 770 (1943), the First Circuit Court of Appeals expressly acknowledged the Second Amendment guarantees an individual right when it noted the law in question "undoubtedly curtails to some extent *the right of individuals* to keep and

bear arms . . . ."[1] Emphasis added. Further, the court in *Cases* concluded *U.S.* v. *Miller*, 307 U.S. 174 (1939), should not be read as holding the Second Amendment guaranteed the right to possess or use large weapons that could not be carried by an individual. This impliedly acknowledges an individual right to own firearms; the issue is what types of firearms are encompassed within that right.

In *U.S. v. Graves*, 554 F.2d 65 (3rd Cir. 1977), the defendant did not raise the Second Amendment as a challenge to the "statutory program which restricts the right to bear arms of convicted felons and other persons of dangerous propensities."[2] However, a personal right in the Second Amendment is found in a footnote wherein the court states "[a]rguably, any regulation of firearms may be violative of this constitutional provision."

U.S. v. Tot, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) is another case involving possession of a firearm by a convicted felon. Despite holding that the failure of the defendant to prove, as required by *Miller*, a militia use for the firearm was an adequate basis for ruling against the defendant, the court, in *dicta*, concluded the Second Amendment "was not adopted with individual rights in mind . . . ." This result was based on reliance on an extremely brief analysis of common law and colonial history.[3] In addition, apparently recognizing that it decided the case on unnecessarily broad grounds, the court noted that, at

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[1] Id. at 921

[2] Implicit in this language is the fact that the Second Amendment guarantees an individual right, albeit a right that may not be enjoyed by some narrowly defined class of untrustworthy persons.

[3] For example, the court referred to the colonists as "a defenseless citizenry . . . ." In fact, it was precisely because the citizens *did* have arms and were not defenseless that they desired the Second Amendment; they did not want to *become* defenseless.

common law, while there was a right to bear arms, that right was not absolute and could be restricted for certain classes of persons "who have previously . . . been shown to be aggressors against society."

U.S. v. Johnson, 497 F.2d 548 (4th Cir. 1974) is one of the three court of appeals cases which uses the term "collective right." The entire opinion, however, is one sentence, which states the Second Amendment "only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia'."[4] As authority for this statement, the court cites *Miller* and *Cody v. U.S., infra.* Yet, as this Court in *Lewis v. United States*, 445 U.S. 95 (1980) made clear, *Miller* held it is the firearm itself, not the act of keeping and bearing the firearm, which must have a "reasonable relationship to the preservation or efficiency of a well-regulated militia." Moreover, the particular provision at issue in *Johnson* concerned the interstate transportation of a firearm by convicted felons, a class of persons which historically has suffered the loss of numerous rights (including exclusion from the militia) accorded other citizens.

U.S. v. Bowdach, 414 F. Supp. 1346 (D.S. Fla 1976), *aff'd*, 561 F.2d 1160 (5th Cir. 1977). The court held that "possession of the shotgun by a non-felon has no legal consequences. U.S. Const. Amend II." Again, this is at least an implied recognition of the fact the Second Amendment confers an individual right upon citizens.

U.S. v. Johnson, Jr., 441 F.2d 1134 (5th Cir. 1971). Once again, this decision merely quotes from *Miller* the statement concerning the requirement of an evidentiary showing of a militia nexus and a consequent rejection, without even the

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[4]As with all rights guaranteed in the Bill of Rights, the Second Amendment does not "confer" any rights; it merely protects rights from government interference.

briefest of analysis, of the defendant's challenging to the constitutionality of the National Firearms Act of 1934 (NFA). Apparently, the defendant failed to put on evidence, as required by *Miller*, that the firearm at issue had a militia use. Thus, *Miller* bound the appeals court to reject the defendant's challenge.

U.S. v. Warin, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976). Following, and relying upon, its earlier decision in *Stevens, infra*, the court simply concluded, without any reference to the history of the Second Amendment, that it "is clear the Second Amendment guarantees a collective rather than an individual right." The court in Warin also indicated that, in reaching its decision, it was relying upon the First Circuit's decision in *Cases, supra*. Yet in concluding not all arms were protected by the Second Amendment, *Cases* did not hold, as did *Warin*, that the Second Amendment afforded individuals no protections whatever.

The court in *Warin* also erred in concluding Warin's relationship to the militia was relevant to determining whether his possession of a machine gun was protected by the Second Amendment, since this Court in *Miller* focused on the firearm itself, not the individual involved. In fact, this Court in *Miller* quite expansively defined the constitutional militia as encompassing "all males physically capable of action in concert for the common defense."

Citing *Miller*, the court in *U.S. v. Day*, 476 F.2d 562 (6th Cir. 1973) concluded, in reviewing a challenge to the statute barring dishonorably discharged persons from possessing firearms, that "there is no *absolute* right of an individual to possess a firearm." Emphasis added. Since there are certain narrowly defined classes of untrustworthy persons, such as convicted felons and, as here, persons dishonorably discharged from the armed forces, who may be barred the possession of firearms, it is a truism to say that there is not

an *absolute* right to possess firearms. In so saying, the court implicitly recognized the individual right of peaceful and honest citizens to possess firearm.

In a one sentence holding in *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), the court simply concluded the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms . . . ." The ruling was based on an apparent misreading of *Miller* (as also happened in the present *Hickman v. County of Los Angeles* matter), in that the court undertook *no* analysis of *Miller* or of the history of the ratification of the Second Amendment. This case, moreover, involved possession of firearms by convicted felons, a class of persons whose right traditionally have been more restricted than law-abiding citizens.

In rejecting a Second and Fourteenth Amendment challenge to a local handgun ban, the court in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) held the Second Amendment, either of itself or by incorporation through the Fourteenth Amendment, "does not apply to the states. . . ." The court, in *dicta*, went on, however, to "comment" on the "scope of the second amendment," incorrectly summarizing *Miller* as holding that the right extends "only to those arms which are necessary to maintain a well regulated militia." Thus, finding (without evidence on the record) that "individually owned handguns [are not] military weapons," the court concluded that "the right to keep and bear handguns is not guaranteed by the second amendment."

U.S. v. McCutcheon, 446 F.2d 133 (7th Cir. 1971) is another case involving the NFA in which the court merely followed *Miller* in holding that the NFA did not infringe the Second Amendment.

In *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992), a case which was argued *pro se*, the court concluded that *Miller* held it was "not sufficient to prove the weapon in question was susceptible to military use. Rather, the claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well-regulated militia..... Hale introduced no evidence and made no claim of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia." Notably, one of the three judges, while concurring in the result, "disagree[d]" with the court's interpretation of *Miller*, insofar as it was interpreted to "say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes."

U.S. v. Nelson, 859 F.2d 1318 (8th Cir. 1988), which is not a firearms case, involves the federal switchblade knife act. Based on part of the holding in *U.S. v Cruikshank*, 92 U.S. 542, 553 (1876), that the right to keep and bear arms "is not a right granted by the Constitution," the Eighth Circuit concluded that the right is not fundamental.[5] Of course, the *complete* statement in *Cruikshank* — a case

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[5] *Cruikshank* was the first case in which this Court had the opportunity to interpret the Second Amendment. This Court recognized that the right of the people to keep and bear arms was a right which existed prior to the Constitution when it stated that such a right "is not a right granted by the Constitution... [n]either is it in any manner dependent upon that instrument for its existence." The indictment in *Cruikshank* charged, *inter alia*, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the bearing of arms for lawful purposes. This Court held that, because the right to keep and bear arms existed independent of the Constitution, and the Second Amendment guaranteed only that the right shall not be infringed by Congress, the federal government had no power to punish a violation of the right by a private individual; rather, citizens had "to look for their protection against any violation by their fellow-citizens" of their right to keep and bear arms to the police power of the state.

which involved the theft of firearms by private citizens from other private citizens — simply meant the right was not *created by* the Constitution, but that it preexisted the Constitution and that the Second Amendment was "to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes" to the state criminal laws.

Moreover, the Eighth Circuit's one paragraph opinion cited *Miller*, *Oakes*, *supra*, and *Warin*, *supra*, without any explanation, in holding the Second Amendment has been analyzed "purely in term of protecting state militias, rather than individual rights." While this statement is true, it certainly does not mean that *Miller* rejected the conclusion that an individual right was protected. Thus, the Eighth Circuit did not err in concluding that it was important that "Nelson has made no arguments that the Act would impair any state militia . . . ."

U.S. v. Cody, 460 F.2d 34 (8th Cir. 1972) involved the making of a false statement by a convicted felon in connection with the purchase of a firearm. After citing *Miller* for the propositions that "the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms" and that the "Second Amendment's guarantee extends only to use or possession which 'has some reasonable relationship to the preservation or efficiency of a well regulated militia,'" the court held there was "no evidence that the prohibition of § 922(a)(6) obstructs the maintenance of a well-regulated militia." Thus, the court acknowledged the Second Amendment would be a bar to some congressional regulation of the use or possession of firearms, and it recognized that *Miller* required the introduction of evidence which showed a militia use for the firearm involved.

In *U.S. v. Decker*, 446 F.2d 164 (8th Cir. 1971), as in *Synnes*, *infra*, the court here held the defendant could "present evidence indicating a conflict" between the statute at issue and the Second Amendment. Since he failed to do so, the court declined to hold that the record-keeping requirements of the Gun Control Act of 1968 violated the Second Amendment. As with *Synnes*, the court once again implicitly recognized that the right guaranteed belonged to individuals.

In *U.S. v. Wiley*, 309 F.Supp. 141 (D. Minn.), *aff'd*, 438 F.2d 773 (8th Cir. 1971), another case involving possession of a firearm by a convicted felon, the court held felons are "a separate class whose *individual right* to bear arms may be prohibited." 309 F.Supp. at 145.

U.S. v. Synnes, 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972) was another case involving possession of a firearm by a convicted felon. In holding 18 U.S.C. App. § 1202(a) (reenacted in 18 U.S.C. § 922(g) in 1986) did not infringe the Second Amendment, the court held (based upon its partially erroneous view of *Miller*) evidence had to be offered to show the statute impaired the maintenance of a well-regulated militia. As there was "no showing that prohibiting possession of firearms by felons obstructs the maintenance of a 'well regulated militia,'" the court saw "no conflict" between § 1202(a) and the Second Amendment. While *Miller* focused on the need to introduce evidence that the *firearm* had a militia use, *Synnes* at least recognized the relevance of a militia nexus. There was a clear recognition, moreover, that the Second Amendment guarantees an individual right.

As indicated in petitioner's petition, six days after the Ninth Circuit decision in the present case (*Hickman*), a different panel of the Ninth Circuit Court of Appeals stated in a footnote in *U.S. v. Gomez*, 81 F.3d 846 (9th Cir. 1996), "The Second Amendment embodies the right to defend

oneself and *one's* home against physical attack." *Gomez* 81 F.3d at 850, n.7. [emphasis added]. Clearly, this panel interpreted the Second Amendment as guaranteeing a personal right.

In *U.S. v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978), although the court recognized the requirement of *Miller* that the defendant show the firearm in question have a "connection to the militia," the court concluded, without any explanation of how it reached the conclusion, that the mere fact that the defendant was a member of the Kansas militia would not establish that connection. In light of the fact *Miller* (which defines the militia as including "all males physically capable of acting in concert for the common defense") saw no relevance in the status of a defendant with respect to the militia, but instead focused upon the firearm itself, this conclusion is not without basis.

In the context of interpreting the meaning of the phrase "engaging in the business of dealing in firearms" in 18 U.S.C. 922(a)(1), the court in *U.S. v. Swinton*, 521 F.2d 1255 (10th Cir. 1975) noted, in *dicta*, merely that "there is no *absolute* constitutional right of an individual to possess a firearm." [Emphasis added.] Clearly, therefore, the court recognized that the right is an individual one, albeit not an absolute one.

Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990) *(mem)*. The court held that the Second Amendment "guarantees to all Americans 'the right to keep and bear arms' . . . ."

Based upon the above survey, it is obvious the courts of appeals are having difficulty interpreting both the Second Amendment, as well as this Court's decision in *Miller*. The circuits are not only split as to each other, but there are

diametrically opposed rulings from different panels within the same circuit. The result is a confusing quagmire of inconsistent rulings.

Amici respectfully submit it is incumbent upon this Court to step in and, finally, resolve this very important issue.

III. THE VAST MAJORITY OF SCHOLARS HAVE ENDORSED THE VIEW THAT THE SECOND AMENDMENT GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Innumerable politically based pronouncements in non-scholarly sources claim the Second Amendment does not guarantee a right of individuals, but rather, guarantees only the "states' right" to arm their militias. That position (which we shall call the " "states' right" " view) is rejected by the great majority of modern legal scholars, *inter alia* because the very concept of the Second Amendment as a "states' right" was completely unknown to the authors of the Bill of Rights (hereinafter described as the Founders or the Founding Fathers).

Of 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the "states' right" position. None of these four was published on its merits — each being in a symposium in which anti-gun groups and/or individuals were invited to submit articles detailing their position.[6]

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[6]Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV.5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns); Spannaus, "State Firearms Regulation and the Second Amendment", 6 HAMLINE L. R. 383 (1983) (Minnesota attorney general).

In contrast, articles accepting the Amendment as an individual right are published on their own merits and in respected law reviews.[7] The authors include outstanding

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In addition, see Beschle, "Reconsidering the Second Amendment: Constitutional Protection for a Right of Security", 9 HAMLINE L. R.69 (1986) (conceding that the Amendment does guarantee a right of personal security, but arguing that can constitutionally be implemented by banning and confiscating all guns). A somewhat equivocal position is taken in Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L.J. 551 (1991) (the Amendment is an individual right but may not be applicable to present in which only one half of households are armed since its purpose was to insure that the entire populace would be armed).

The article count we have given does not include three other articles: two by authors who disapprove of the constitutional right to arms, but do not seem to deny its existence, Powell, "Capital Punishment, 102 HARV. L. REV. 1035, 1045 (1989) and Brown, "Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's 'The Embarrassing Second Amendment'" 99 YALE L. J. 661 (1989); and a third article which simply catalogs the contending positions taken by each side, Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" 59 U. CHI. L. R. 453 (1992).

[7]Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994), Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONST. COMM. 87 (1992); Kates, Cottrol & Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143 (1986); Malcolm, Essay Review, 54 GEO. WASHINGTON U. L. REV. 582 (1986); Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH.

L. REV. 203 (1983) (hereinafter described as "Original Meaning); *see also* Scarry, "War and the Social Contract: The Right to Bear Arms", 139 U. PA. L. REV. 1257 (1991); Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L. J. 551 (1991).

The remainder of the 37 individual right articles are in less prestigious law reviews: Kates & Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution), Halbrook, "Rationing Firearms Purchases and the Right to Keep Arms" 96 W. VA. L. REV. 1 (1993); Comment: "Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?" 37 VILLANOVA L. REV. 1407 (1992); Halbrook, "The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment", 26 VALPARAISO L. REV. 131 (1991); Tahmassebi, "Gun Control and Racism", 2 GEO MASON CIV. RTS.L. J. 67 (1991); Bordenet, "The Right to Possess Arms: the Intent of the Framers of the Second Amendment", 21 U.W.L.A. L. REV. 1 (1990); Moncure, "Who is the Militia - The Virginia Ratifying Convention and the Right to Bear Arms", 19 LINC. L. REV. 1 (1990); Lund, "The Second Amendment, Political Liberty and the Right to Self-Preservation", 39 ALA. L. REV. 103 (1987); Morgan, "Assault Rifle Legislation: Unwise and Unconstitutional", 17 AM. J. CRIM. L.143 (1990); Dowlut, "Federal and State Constitutional Guarantees to Arms", 15 U. DAYTON L. REV. 59 (1989); Halbrook, "Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. DAYTON L. REV. 91 (1989); Hardy, "The Second Amendment and the Historiography of the Bill of Rights", 4 J. LAW & POLITICS 1 (1987); Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment", 9 HARV. J. LAW & PUB. POLICY 559 (1986); Dowlut, "The Current Relevancy of Keeping and Bearing Arms", 15 U. BALT. L. FOR. 32 (1984); Malcolm, "The Right of the People to Keep and Bear Arms:The Common Law Tradition", 10 HAST. CONST. L. Q. 285 (1983); Dowlut, "The Right to Arms", 36 OKL. L. REV. 65 (1983); Caplan, "The Right of the Individual to Keep and Bear Arms" 1982 DET. COLL.L. REV. 789; Halbrook, "To Keep and Bear 'Their Private Arms' ", 10 N. KY. L. REV. 13 (1982); A. Gottlieb, "Gun Ownership: A Constitutional Right" 10 N. KY. L. REV. 138 (1982); Gardiner, "To Preserve Liberty — A Look at the Right to Keep and

liberal constitutional scholars such as Akhil Amar, Sanford Levinson and William Van Alstyne — none of whom own guns or expected that the evidence would force this position on them. In his just published piece, Prof. Van Alstyne, a former member of the ACLU national board, describes the

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Bear Arms", 10 N. KY. L. REV. 63 (1982); Note, "Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?", 21 WASHBURN L.J. 244 (1982); Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 GEO MASON L. REV. 1 (1981).

The following treatments in book form also support the individual right position is correct: J. Malcolm, "ARMS FOR THEIR DEFENCE": THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994); D. Kates & R. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993); Kates, Cottrol & Diamond, "Public Safety and the Right to Bear Arms", in D. Bodenhamer & J. Ely, AFTER 200 YEARS; THE BILL OF RIGHTS IN MODERN AMERICA (Ind. U. Press, 1993); D. Kates, OXFORD COMPANION TO THE UNITED STATES SUPREME COURT (Oxford U. Press, 1992) (entry on the Second Amendment); E. Foner & J. Garrity, READER'S COMPANION TO AMERICAN HISTORY 477-78 (Houghton Mifflin, 1991) (entry on "Guns and Gun Control"); D. Kates "Minimalist Interpretation of the Second Amendment" in E. Hickok (ed.), THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (U. Va. Press, 1991); S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (Greenwood, 1989); L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (Macmillan, 1988); D. Hardy, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (Blacksmith,1986); D. Kates, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Macmillan, 1986) (entry on the Second Amendment); S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" and Halbrook, "The Second Amendment as a Phenomenon of Classical Political Philosophy" — both in D. Kates (ed.), FIREARMS AND VIOLENCE (1984); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., RIGHT TO KEEP AND BEAR ARMS (1982).

individual right/"states' right" debate as being between those who take the Bill of Rights seriously and those who do not.[8]

IV. THE IMPLICATIONS OF THE "STATES' RIGHT" VIEW CANNOT WITHSTAND EXAMINATION.

Professor Van Alstyne actually understates the matter when he characterizes the individual rights vs. "states' right" debate as one between those who do take the Bill of Rights seriously and those who do not. In fact, advocates of the "states' right" view do not even take their own position seriously enough to explore its potential results — which turn out to be at least as socially adverse as those often attributed to the individual right view.

In that view the basis of the Second Amendment was the right to arms for personal defense, no distinction being made between apolitical and political crime.[9] Accordingly, both

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[8]Van Alstyne, 43 DUKE L. J. *supra* at 1254-5. Compare Professor Levinson's analysis: If the Second Amendment is to be read out of the Constitution "in the name of social prudence why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are 'Cost-benefit' analysis, rightly or wrongly, has come to be viewed as a 'conservative' weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play." 99 YALE L. J. *supra* at 657-58.

[9]Don B. Kates 9 CONSTITUTIONAL COMMENTARY *supra* at 89-103 citing examples and quoting and analyzing Locke, Sidney, Montesquieu, Blackstone, Madison, Jefferson, Paine and numerous others. See discussion and quotations in footnote 20 *supra*.

the Amendment's text and the logic of the individual rights view limit the kind of weaponry the Amendment guarantees individuals to small arms only.

But the "states' right" view holds that the Amendment was intended to guarantee that states may equip their forces with arms sufficient to counterbalance the military force of the federal government. Thus any *honest*, conscientious treatment of the "states' right" view requires asking: Does not this position involve the conclusion that every state may, if it wishes, stockpile not just small arms but artillery, bombers, aircraft carriers, ICBMs and nuclear weapons for the use of its forces?[10] If the proponents of the "states' right" view have some *honest, principled* basis for a negative answer to the foregoing question, they have failed to offer it in their articles. Those articles "answer" such questions by ignoring them. "states' right" articles explore none of that view's implications beyond the naked claim that the Amendment does not preclude government from banning and confiscating all privately owned firearms.

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[10]Space permits mentioning just one of the textual and logical limitations implicit in the individual view which are inapplicable to the states' right-only view. The Amendment guarantees the right to "keep *and bear* arms": Since an 18th Century man could not bear (i.e. pick up) cannon, the intent seems limited to small arms. By parity of reasoning it would not include even now-portable arms, like bazookas, because they are comparable in destructiveness to an 18th Century cannon.

But that limitation does not apply if the Amendment be deemed to create a states' right to possess military forces against the United States. If one can stomach the incongruity of describing a state as "bearing" arms, that state is obviously no more incapable of "bearing" cannon than any other kind of arms.

For a catalog of textual and logical limitations implied by the individual right view see, e.g. Don B. Kates "Original Meaning", 82 MICH. L. REV. *supra* at 259*ff.* (1983); D. Kates, 49 LAW & CONTEMP. PROBS. *supra* at 146-8 and Halbrook, 49 LAW & CONTEMP. PROBS. *supra* at 157-60.

A related question arises from the crucial difference between the two views in defining what "militia" means as that term is used in the Amendment. The individual rights view rests on the preferred 18th Century meaning of "militia" — not some formal military unit, but a system under which each household was required to be armed and virtually every military-age male was required to own arms and appear for training and/or service when called to do so.[11] But in the "states' right" view the word "militia" refers to a formal military unit, a body of troops serving the state. Indeed, it is regularly asserted by partisans of that view that the "militia" is the National Guard, notwithstanding this Court's holding in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). But if these claims of the "states' right" analysts are correct, how can one escape the conclusions: a) that the Amendment repeals Art. I § 10, cl. 3, of the original Constitution which forbids states to "keep troops" without the consent of Congress; and b) that *Perpich* was wrongly decided, a cognate effect of the Amendment having been to modify Art. I, § 8, cls. 15 and 16 by exalting state power over the militia vis-a-vis federal?[12]

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[11] Don B. Kates, "Original Meaning", 82 MICH. L. REV. *supra* at 214-8 ("In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia." *Id.* at 215), Shalhope, 49 LAW & CONTEMP. PROB. *supra* at 133 ("Individuals had the right to possess arms to defend themselves and their property; and states retained the right to maintain militias composed of these individually armed citizens."). *See also* note 18 *supra* and Amar, 100 YALE L. J. *supra* at 1166 as quoted in note 24 *infra* and ut any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms . . . [So] 'the militia' is identical to 'the people'. . . ").

[12] In fact, the concept of militia held by partisans of the states' right-only view is simply not the "militia" concept to which the Amendment refers: "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semi-professional part-time volunteers, like today's Guard, would have been

To reiterate, partisans of the "states' right" view have not even attempted to grapple with these questions. Though their articles purport to champion a "states' right" view, in fact it is just a makeweight — a disingenuous gibberish-concept which is presented without analysis of its content or implications solely to evade the inconvenient truth that the Amendment precludes the prohibition and confiscation of all firearms.

Respectfully submitted,

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called 'a *select* corps' or '*select* militia' — and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms [So] 'the militia' is identical to 'the people'..." Amar, *supra*, 100 YALE L. J. at 1166, emphasis in original. *See also:* J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. [Emphasis in original.]"

(4)

Supreme Court, U.S.
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No. 96-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, *in propria persona*
Petitioner

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, AND DOMINICK J. RIVETTI,
Respondents

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

PETITIONER DOUGLAS RAY HICKMAN'S BRIEF IN REPLY TO OPPOSITION OF RESPONDENTS COUNTY OF LOS ANGELES AND SHERMAN BLOCK TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

ARGUMENT

I.

INTRODUCTION

It is most curious that Respondents County of Los Angeles and Sherman Block chose not to address the merits of Petitioner's Petition for Writ of Certiorari. Rather, they briefly raised two technical challenges to the propriety of the Petition. The only reasonable inference from this is that, but

for the technical objections, Respondents would agree this Court should issue its Writ of Certiorari.[1]

Of course, it is entirely possible Respondents' opposition consisted of a scant two and one-half pages in an attempt to create the *impression* this Petition is of little import. However, in so doing, Respondents actually demonstrated additional compelling reasons for this Court to grant certiorari.

Specifically, Respondents showed the Ninth Circuit departed so far from the accepted and usual course of judicial proceedings as to call upon this Court to exercise its supervisory power, and further, that the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Pursuant to Supreme Court Rule 10(a) and 10(c), these are both important reasons for this Court to issue its Writ.

Since, as shown below, both of Respondent's arguments can be disposed of in short order, and since Respondents did not challenge the merits of this Petition, this Court is respectfully requested to grant certiorari in this matter.

II.

REGARDLESS OF WHAT THE PARTIES CONTENDED IN THEIR APPELLATE BRIEFS, PURSUANT TO SUPREME COURT RULE 10(a), THE "INDIVIDUAL RIGHT" ISSUE IS PROPERLY AND SQUARELY BEFORE THIS COURT

Rule 10(a) of the Supreme Court Rules states, in part, an important reason for this Court to grant certiorari is where a court of appeals "has so far departed from the accepted and

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[1]The Petition for Certiorari is cited as "Pet. _____" The Appendices to the Petition are cited as "Pet. App. _____" The Respondents' Brief in Opposition is cited as "Resp. Opp. _____."

usual course of judicial proceedings, . . . as to call for an exercise of the Court's supervisory power[.]"

If, as Respondents suggest, the Ninth Circuit adjudicated an issue which was not before it,[2] then the Ninth Circuit clearly departed from the "accepted and usual course of judicial proceedings" and it is incumbent upon this Court to exercise its supervisory power.

Indeed, if the Ninth Circuit strayed so far from the issue before it that its ruling had nothing to do with the contentions in Petitioner's appellate papers, then the Ninth Circuit exceeded its powers under Article III to the United States Constitution, such that it's opinion should be set aside on that basis alone.

On the other hand, the Ninth Circuit believed the issue of whether an individual has standing under the Second Amendment was squarely before it, because that was the sole issue it addressed in its published opinion.[3]

Either way, this Court should issue its Writ and thereby review the Ninth Circuit's opinion.

Moreover, Respondents' suggestion that this Court should not issue its Writ because Petitioner allegedly did not raise the individual rights issue in the court below would lead to an outrageous, circuitous and anomalous result. Namely, using Respondents' logic, review would never be possible with respect to any court of appeals opinion in which an appellate court strayed from the issues before it. In each

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[2]Resp. Opp. at 4.

[3]In addition, since the Ninth Circuit's opinion dealt solely with the "individual right" issue, it is irrelevant even if Petitioner quoted an updated version of Penal Code Section 12050, as Respondents assert. (Resp. Opp. at 2). This is because the Ninth Circuit's published opinion dealt only with the "individual right" issue, and Section 12050 had no bearing on the Ninth Circuit's holding.

such instance, the respondent would argue the petitioner had not raised the issue upon which the opinion was based, all the while, the petitioner could not have raised that issue because he or she could not have predicted the court of appeals would base its opinion on an issue which was not before it.

In short, Respondents' assertion that this Court should not grant certiorari because Petitioner allegedly did not litigate the "individual right" issue below, is wrong. The "individual right" issue is properly and squarely before this Court.

III.

PETITIONER DOES NOT SEEK AN "ADVISORY OPINION;" RATHER, PETITIONER ASKS THIS COURT OF LAST RESORT TO RECOGNIZE AND PROTECT AN IMPORTANT CONSTITUTIONAL RIGHT

At first blush, Respondents' assertion that Petitioner seeks nothing more than "an advisory opinion" appears valid. However, upon closer scrutiny, it quickly becomes clear this assertion is meritless.

Respondents assert Petitioner seeks an advisory opinion because, they contend, the outcome of the case below will not be altered even if Petitioner prevails.[4] This is plainly incorrect. Petitioner's initial complaint contained a cause of action for violation of the Second Amendment to the United States Constitution. This cause of action was dismissed by the trial court on March 31, 1992.[5]

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[4]Resp. Opp. at 5.

[5]Order.

Therefore, if this Court grants certiorari, and Petitioner ultimately prevails on the individual right issue, Petitioner will then have the right to proceed in the district court on his cause of action for violation of the Second Amendment. As such, Petitioner does not seek an advisory opinion; rather, he seeks an opinion which will have a very real and definite effect on the outcome this case.

If Petitioner is permitted by this Court to proceed on his Second Amendment cause of action, Respondents will, no doubt, argue in the district court the claim should be dismissed on incorporation grounds. However, only then will incorporation be an issue in this litigation. At the present time, and based on the record before this Court, the incorporation issue raised by Respondents is not yet "ripe."

This points out yet another anomaly created by the Ninth Circuit's opinion: the Ninth Circuit held the Second Amendment guarantees only a state's "right" to maintain a militia, yet it failed to explain how a state can even have a "right," as opposed to a "power."

The incorporation issue is clearly beyond the scope of this Petition. Nonetheless, it is worthwhile to note that while the Second Amendment has never been expressly incorporated against the states, since the advent of the Doctrine of Selective Incorporation around the turn of the century,[6] this Court has never held it is *not* incorporated against the states, either.

Moreover, it necessarily follows that before this Court can incorporate the Second Amendment against the states, this Court must first determine exactly what right is encompassed within that Amendment. Since this Court has never addressed the issue now presented; namely, whether the

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[6] *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897).

Amendment confers upon individual citizens standing to enforce a personal right to keep and bear arms, it is no surprise that this Court also has never addressed whether that right is incorporated against the states.

As stated above, the incorporation issue is beyond the scope of this Petition. Here, Petitioner simply asks this Court to resolve the much disputed[7] question as to whether the Second Amendment, included within the Bill of Rights, guarantees an individual right, or a "state's right."

Rule 10(c) of the Supreme Court Rules states an important reason for this Court to grant certiorari is where a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Clearly, this is the situation in the present matter. This Court is respectfully requested to grant certiorari and resolve the very important, yet divisive, issue as to whether the Second Amendment guarantees an individual right.

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[7]See the *amicus* brief submitted in support of Petitioner by The Lawyer's Second Amendment Society, the Law Enforcement Alliance of America, and Doctors for Integrity in Policy Research, wherein their review of all the cases from the courts of appeals reveals there are conflicting rulings between, and within, the courts of appeals on the issue of whether the Second Amendment guarantees an individual right.